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Supreme Court, U.S.
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No. 06-795

IN THE

Supreme Court of the United States

KAY STONE,

Petitioner,

v.

THE HEALTH CARE AUTHORITY
OF THE CITY OF HUNTSVILLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Respondent, The Health Care Authority of the City Huntsville ("Huntsville Hospital"), was entitled to summary judgment on the claim of Petitioner Kay Stone ("Stone") that her employment was terminated because of disability discrimination and/or retaliation, where, following a reasonable investigation by the decision-maker, which included an interview of and a confession by Stone, the decision-maker reasonably concluded that Stone made a threatening remark concerning her supervisor in violation of Huntsville Hospital's well established and uniformly administered prohibition of such remarks?

LIST OF PARTIES

Respondent, The Health Care Authority of the City of Huntsville, d/b/a Huntsville Hospital, is a political subdivision of the State of Alabama organized under the Health Care Authorities Act of 1982, §§ 22-21-310, *et seq.* ALA. CODE (1975).

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STATEMENT OF THE CASE

The Statement of the Case included in the petition of Kay Stone ("Stone") does not fairly describe the factual circumstances in this litigation, which Respondent Healthcare Authority of the City of Huntsville ("Huntsville Hospital") provides below.

Despite a host of physical, intellectual, psychological, and personality disorders, Stone was hired in 1990 by Huntsville Hospital to work in the hospital's business office as a *"favor"* to her mother, who was a long-time supervisor in that office. (Doc. 49, Tab 29, Ex. 70 at 3; Doc. 1 ¶ 7; Doc. 49, Tab 5 ¶ 3; Doc. 49, Tab 30 at 4.)[1] Her job duties included the filing of patient records and relief for mail couriers in the hospital. (Doc. 49, Tab 5 ¶ 24; Doc. 49, Tab 4 ¶ 3.)

Although Stone *"struggled"* (Doc. 49, Tab 15 at 148), she was able to perform routine tasks with accommodations provided by Huntsville Hospital. (Doc. 49, Tab 5 ¶ 31.) She *"was happy to have a job [and] some coworkers that cared about her."* (Doc. 49, Tab 5 ¶¶ 31, 44.) Stone *"loved"* her supervisor, Joann McGaha, whom she referred to as her *"other mother."* (Doc. 53, Tab D ¶ 8.) There were times, however, when Stone would refuse to follow instructions and do things *"that sometimes do not make sense,"* which her mother believed was because she wanted *"to assert herself"* and *"make her feel good about herself."* (Doc. 49, Tab 6 ¶ 4; Doc. 49, Tab 1 ¶ 3; Doc. 49, Tab 28, Ex. 41; Doc. 49, Tab 29, Ex. 119.)

Although Stone's unwillingness to follow directions created problems (Doc. 49, Tab 29, Ex. 120; Doc. 49, Tab 29, Exs. 55, 56, 86; Doc. 49, Tab 15 at 27), Huntsville Hospital did not

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1. Citations in this opposition are to the record in the court of appeals, except where citation is made to Stone's Petition for Writ of Certiorari.

impose discipline on Stone, as it would other employees. (Doc. 49, Tab 5 ¶ 31.)

Also, during the last *"year or two"* of Stone's ten-year employment with Huntsville Hospital there was a significant change in her work performance. Stone, who was already *"slow,"* became a *"whole lot slower."* (Doc. 49, Tab 27 at 184-85.) By Stone's own estimate, her performance fell by a *"good 75 percent."* (*Id.* at 185-86.)

In addition to the dramatic decline in Stone's performance, and her refusal to follow instructions, Stone was *"hypersensitive,"* which made it difficult to counsel her because it *"cause[d] her to hear many things that weren't intended or that weren't there."* (Doc. 49, Tab 15 at 47, 132, 133, 135-37, 160-62.) As explained by one of Stone's psychologists, her hypersensitivity caused her to take counseling *"very personally so that 'you didn't file that right' [became] 'you're a worthless worker.'"* (Doc. 49, Tab 15 at 137.) Stone's perception of helpful corrections by a supervisor as *"harsh and unfeeling"* would *"enrage her more than it would the average person"* (*id.* at 47) and cause her to overreact, even suicidally, at work. (Doc. 49, Tab 23 at 81-82, 173-75 and Ex. 19 thereto; Doc. 49, Tab 25 at 271.) In such instances, Stone's anger *"would come storming out in a kind of not very well modulated, not very well thought through, not very adult explosion."* (*Id.* at 33.) As a result, she would say or do *"something outrageous either indicating that she would try to hurt the person or try to hurt herself."* (*Id.* at 55.)

A good example of Stone's inappropriate response to counseling occurred several months prior to the termination of her employment, after Stone deliberately refused to comply with her supervisor's (McGaha's) instructions. (Doc. 49, Tab 29, Ex. 122) (*"I admit I was stupid ... I didn't obey my bosse's [sic] orders."*) McGaha decided to counsel with her

and asked another supervisor, who is *"someone who is kind"* and *"who Kay is very fond of,"* to participate. (Doc. 49, Tab 29, Ex. 119; Tab 3 ¶¶ 7, *et seq.*) However, when McGaha and the other supervisor tried to explain to Stone that she should not disregard McGaha's instructions, Stone became *"terribly upset," "stormed out mad and crying"* and threatened suicide, stabbing her wrist with scissors. (Doc. 49, Tab 3 ¶ 7; Tab 4 ¶ 9; Tab 7 ¶ 7; Tab 23, Ex. 19; Tab 29, Exs. 119 and 120.)

Another such incident occurred the day before the termination of Stone's employment, after McGaha told Stone that she was *"disappointed"* in her failure to complete her work on time and said, *"Let's stay on schedule tomorrow . . . [and] get our deliveries on time."* (Doc. 49, Tab 17 at 37-40, 41, 55; Tab 27 at 239; Tab 28 Ex. 63.) According to Stone's own handwritten description of the incident, she became so angry and upset that she *"felt like she was going to choke"* McGaha and that her mother had to give her *"two Xanax"* to calm her down. (Doc. 49, Tab 29, Ex. 61.)[2]

The next morning, during her lunch break, Stone told a co-worker, Amy Ashby ("Ashby"), that she had gotten so angry with McGaha the previous afternoon that she felt like she was going to choke McGaha's neck and she made a choking gesture with her hands. (Petition at 11a.) Stone's

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2. A few weeks earlier, the Office Manager documented her concern that Stone *"could be a threat to herself and/or other employees."* (Doc. 53, Tab A, Ex. 33; Doc. 49, Tab 5 ¶ 57.) Another supervisor testified:

> I observed that Kay was emotional — very emotional, and there appeared to be something brewing there. Couldn't put your finger on it, but it was — the outburst did not surprise me because it's like — I guess like a balloon ready to pop or something.

(Doc. 49, Tab 12 at 100.)

comment and actions *"really bothered"* Ashby so she told McGaha who reported this information to the Human Resources Department and her manager, Jan Henderson. (Petition at 11a.) A Human Resources representative instructed McGaha to have Ashby document Stone's comments, which McGaha did and took to Andrea Rosler, the hospital's Vice President of Human Resources. (Petition at 11a-12a.). Rosler decided to meet with Ashby personally and hear exactly what Stone said, and McGaha was given permission to go home early. (Petition at 12a.)

Ashby told Rosler that Stone said that McGaha's criticism of her work the previous day had made her so angry that she had wanted to *"choke"* McGaha, and that her mother had to give her two Xanax to calm her down. Ashby also told Rosler that Stone was still *"furious"* and was *"rocking back and forth"* while she was relating the incident. (Doc. 49, Tab 5 at ¶ 55; Doc. 49, Tab 21 at 299-300.) Ashby told Rosler that she was *"really bothered"* by Stone's comments because she thought that Stone was *"serious about hurting"* McGaha. (Doc. 49, Tab 5 at ¶ 55; Doc. 49, Tab 21 at 296-304.)

Ashby also told Rosler that Stone often talked about *"getting"* people who she believed did her wrong and that Stone had made statements before about harming McGaha, who is blind in one eye, such as threatening to *"poke [McGaha's] good eye out."* (Doc. 49, Tab 5 ¶¶ 56-57; Doc. 49, Tab 8 at ¶ 38.) Ashby also told Rosler that Stone once told her about wanting to hurt one of her doctors because he had *"f_ _ _ _ d her over"* and that Stone had been so furious on a telephone call to her doctor's office that it *"scared"* her. Ashby also told Rosler that Stone had talked about *"getting rid"* of the doctor's wife. (Doc. 49, Tab 5 ¶ 56.)

Rosler and Henderson then met with Stone, who admitted to making the alleged statement. (Doc. 49, Tab 5 ¶ 61; Doc. 49, Tab 27 at 248-49 and Ex. 59 thereto; Doc. 49, Tab 13 at 134.) During this litigation, Stone has admitted that during her discussions with Rosler, she *"confess[ed] to a crime"* that she now says that *"she did not commit."* (Doc. 81 at 39.) Stone's handwritten notes of her discussions with Rosler and Henderson state: *"Andrea Rosler asked me if I said that I felt like choking Joan McGaha's neck and me being honest I said yes. . . ."* (Petition at 12a.)

On the basis of Stone's confession, and the evidence of other threatening comments by Stone, Rosler concluded *"that virtually all of the 'risk factors' indicating the possibility of work place violence were present"* and that Stone's comments had violated the hospital's *"zero tolerance"* policy, which prohibits threatening remarks regardless of intentions. (Petition at 12a; Doc. 49, Tab 5 ¶¶ 52, 66.) Just two days before Stone's termination, another hospital employee (an African-American male) was terminated under that policy for making a threat after a confrontation with another hospital employee, although that employee claimed that he was *"not serious."* (Petition at 12a-13a.)

Accordingly, Rosler decided to terminate Stone's employment. When she so advised Stone, Stone lost control and began hitting her head on the bookshelf while yelling, *"I am going to sue this [G _ _ D _ _ _] hospital."* (Doc. 49, Tab 2 ¶ 25.) Stone then stormed out, threatening suicide. When security guards sought to physically restrain Stone from climbing over the guard railing outside the department office, she began hitting them and the walls of the hallway, finally lying on the floor. (Doc. 49, Tab 5 ¶ 63.) Later, Stone went back to her office in a *"total rage."* (Doc. 49, Tab 1 ¶ 8.)

Several months after her employment was terminated, Stone applied for disability ("SSDI") benefits from the Social Security Administration, certifying that her impairments *"got worse"* prior to her termination and prevented her from carrying out her job duties in a *"satisfactory manner."* (Doc. 49, Tab 29, Ex. 8.) On that basis, Stone stated that she was *"totally disabled"* on the same date she was terminated. (*Id.*, Ex. 9.) Applying *Cleveland v. Policy Management Systems*, 526 U.S. 795, 806 (1999), the district court found that Stone had not provided a "sufficient explanation" for her assertion that she was "totally and permanently disabled" on March 31, 2000, the date of her termination, and concluded that "Stone's inability to perform the essential functions of courier/file clerk keep her from being otherwise qualified, that is, able to perform the essential functions of her job with or without reasonable accommodation" and, thus, "unable to satisfy the second element of her prima facie case." (Petition at 23a.)

The district court and the court of appeals also determined that "the record demonstrates that the reason for Stone's termination was her threat made against her supervisor . . . , that no reasonable accommodations were denied to Stone and Huntsville Hospital did not retaliate against her." (Petition at 2a.)[3]

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3. Prior to that, another district judge also granted summary judgment and dismissed Stone's claims, but that order was vacated and remanded because it adopted Huntsville Hospital's briefs as the opinion of the court. (Petition at 5a.)

THE REASONS WHY STONE'S PETITION SHOULD BE DENIED

Stone's petition argues that different standards are applied by the courts of appeal in cases involving allegations that a higher-ranking official took adverse action against an employee because of influence by a lower ranking official with discriminatory animus. According to Stone, the Fourth Circuit's decision in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 227, 291 (4th Cir. 2004) (*en banc*), *cert. dismissed*, 543 U.S. 1132 (2005), imposes too stringent a standard in so-called *"cat's paw"* or *"rubber stamp"* cases and allows the employer to avoid liability even if a subordinate supervisor with discriminatory animus "had a substantial influence on the ultimate decision or ... played a role, even a significant one, in the adverse employment decision." (Petition at 7.) According to Stone, cases like *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990), correctly hold that liability should be imposed if the higher ranking official's decision would not have been made had it not been for the lower ranking official's *"recommendation"* or *"influence."* (Petition at 9-10, citing also *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004).)

Stone argues that the Eleventh Circuit *"has taken an approach similar to the Fourth Circuit's"* (Petition at 7), and that this Court should grant review of this matter or to hold her petition pending the review of *BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC*, No. 06-341, *cert. granted*, Jan. 5, 2007.

Huntsville Hospital does not dispute that in *Hill* the Fourth Circuit described the standard that it followed in that case as different from that applied by other courts of appeal. However, for the reasons discussed below, there are multiple reasons Stone's petition in this case should be denied.[4]

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4. *See South Dakota v. Kansas City S. Indus., Inc.*, 880 F.2d 40 (8th Cir. 1988), *cert. denied*, 493 U.S. 1023 (1990); *Sommerville v. United States*, 376 U.S. 909 (1964); *Sanson Hosiery Mills v. NLRB*, 344 U.S. 863 (1952); *The Arlington, Inc. v. Mayer*, 339 U.S. 965 (1950).

1. Stone's Petition Mischaracterizes the Eleventh Circuit's Standard.

Stone argues that an employer in the Eleventh Circuit can effectively insulate itself from liability under the anti-discrimination laws for most, if not all, of its employment decisions, regardless of whether a particular action was based on *"false information"* supplied by a supervisor motivated by discrimination or retaliation, by having a higher ranking official conduct a *"paper review"* of that *"false information."* (Petition at 9.) Stone also asserts that while *"earlier Eleventh Circuit decisions"* recognized that a biased supervisor's *"influence"* over the employer's decision was the *"touchstone of employer liability,"* *"more recent decisions"* have *"abandoned"* that standard in favor of a more stringent approach. (Petition at 7-8.)

Stone's characterization of the Eleventh Circuit's standard is not accurate. In fact, the cases cited by Stone as support for her argument that the Eleventh Circuit has *"abandoned"* the *"influence"* standard actually hold to the contrary. (Petition at 7-8.) For example, in *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328 (11th Cir. 1999), *reh'g denied*, 200 F.3d 818, *cert. denied*, 529 U.S. 1053 (2000) (cited by Stone at page 8 of her Petition), the Eleventh Circuit focused on the alleged causal connection between the alleged bias and the adverse employment action and described its standard in *"cat's paw"* or *"rubber stamp"* cases as follows:

> One way of proving that the discriminatory animus behind the recommendation caused the discharge is under the "cat's paw" theory. This theory provides that causation may be established if the plaintiff shows that the decisionmaker followed the biased recommendation without independently investigating the complaint against the employee. In such a case, the recommender is

> using the decisionmaker as a mere conduit, or "cat's paw" to give effect to the recommender's discriminatory animus.

186 F.3d at 1332 (emphasis added). Then, contrary to Stone's argument that it *"abandoned"* its earlier rule *"that influence was the touchstone for employer liability"* (Petition at 7), the Eleventh Circuit expressly stated that "[i]n this case, Stimpson has not introduced any evidence that could reasonably indicate that the City's alleged discriminatory animus ***influenced*** the Board's decision to terminate her." 186 F.3d at 1332 (emphasis added.)

Similarly, in *Llampallas v. Mini Circuits, Inc.*, 163 F.3d 1236 (11th Cir. 1998), *reh'g denied*, 178 F.3d 1305, *cert. denied*, 528 U.S. 930 (1999), another case cited by Stone as support for her *"abandonment"* argument (Petition at 6), the Eleventh Circuit not only cited and applied its *"earlier"* decisions in the *Sparks* and *Weaver* cases, which Stone asserts were *"abandoned"* in that case (Petition at 5), the Eleventh Circuit also cited and applied what Stone argues is the *"correct standard"* of the Seventh Circuit in *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990) (cited in Petition at 9, 11). 163 F.3d at 1248. Furthermore, the Eleventh Circuit considered and rejected the suggestion made by Stone at page 9 of her petition that an employer in the Eleventh Circuit can escape liability for a subordinate's bias by having a higher ranking official conduct a *"paper review"* of *"false information"* supplied by that subordinate. 163 F.3d at 1249. Instead, the Eleventh Circuit specifically observed:

> [I]f the plaintiff shows that the harasser employed the decisionmaker as her "cat's paw"-i.e., the decisionmaker acted in accordance with the harasser's decision ***without herself evaluating the employee's situation***-causation is established. If

> . . . [the decisionmaker] did not conduct ***his own independent investigation***, and instead merely "rubber stamped" the recommendations of [those who held a discriminatory animus], the causal link between [the plaintiffs'] protected activities and their subsequent termination, would remain intact.

Id. at 1249 (emphasis added.)

The third decision cited by Stone as support for her argument that the Eleventh Circuit has abandoned the *"influence"* standard, *Wescura v. City of South Miami*, 257 F.3d 1238, 1247 (11th Cir. 2001) (Petition at 6), did not define much less apply the *"cat's paw"* standard. Instead, it rejected the assertion by the plaintiff in that case that he had "created a jury issue with respect to the discrimination on the party of a dominant decision-maker (the Mayor) whose decision was rubber-stamped by others (the Commissioners)," because there was no substantial evidence of discriminatory intent on the part of the Mayor. 257 F.3d at 1246-1247.

The fourth case cited by Stone, *McShane v. U.S. Attorney General*, 144 Fed. Appx. 779, 791 (11th Cir. 2005), is an unpublished decision by a panel of the Eleventh Circuit which observed that the decisionmaker had "considered" the input by a person with unlawful animus, but "made the employment decision based on the totality of the circumstances." 144 Fed. Appx. at 791. Although it is not clear just what input was "considered" by the decision-maker in *McShane*, that unpublished decision is not precedent, *see* 11th Cir. R. 36-2, and it was neither cited nor relied on by the district judge or Eleventh Circuit in its unpublished decision in this case.

Other *"more recent"* Eleventh Circuit cases also recognize, contrary to Stone's assertions, that an employer

cannot avoid liability by showing a *"paper review"* by a higher ranking official *"false information"* supplied by a biased supervisor. For example, in *Wright v. Southland Corp.*, 187 F.3d 1287 (11th Cir. 1999), the Eleventh Circuit specifically observed that one way a plaintiff can show a *"causal link"* sufficient to impose liability on the employer is by evidence that the subordinate with bias was able to manipulate or ***"influence"*** the decision "by providing ***false information*** to the decisionmakers for consideration in their decision." 187 F.3d at 1304 n.20 (emphasis added); *see also Holifield v. Reno*, 115 F.3d 1555, 1563-64 (11th Cir. 1997) ("The biases of one who neither makes nor ***influences*** the challenged personnel decision are not probative in an employment discrimination case.") (emphasis added) (quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 10 (1st Cir. 1990)).

Stone's assertion to this Court that the Eleventh Circuit has *"abandoned"* the standard that a biased supervisor's *"influence"* was the *"touchstone"* of employer liability is not only contrary to what the Eleventh Circuit has held, it is also contrary to Stone's prior characterizations in this case of the Eleventh Circuit's standard. Indeed, Stone's opening brief to the Eleventh Circuit asserted that the case law in the Eleventh Circuit was *"clearly established and controlling"* and that it *"recognized that employers are nevertheless liable when a subordinate with bias influences an unbiased decisionmaker to terminate an employee."* (Initial Brief of Appellant at 43.) Stone even cited the Eleventh Circuit's decision in *Llampallas* as the basis for her claim that *"clearly established and controlling Eleventh Circuit case law"* holds that the *"cat's paw"* standard is met when there is evidence that the subordinate with bias was able to *"manipulate or influence"* the decision *"by providing false information to the decisionmakers for consideration in their decision."* (Initial Brief of Appellant at 43-44.) As discussed above,

Stone's petition to this Court cites *Llampallas* for the contrary proposition. (Petition at 8-9.)[5]

2. There Was No Reason For Either The District Court Or The Eleventh Circuit To Apply The Cat's Paw Analysis In This Case.

Not only does Stone mischaracterize the Eleventh Circuit's standard in *"cat's paw"* cases, there was no basis or evidence in this case, regardless of the standard applied, that would change the ultimate outcome of this litigation.

Stone's own contemporaneous notes and her admitted *"confession"* to Rosler of what she had said made it unnecessary for either the District Court or the Eleventh Circuit to address Stone's argument that Rosler allowed herself to become McGaha's *"cat's paw."* Neither was there any evidence that Rosler acted on the basis of a *"recommendation"* by McGaha or on an *"embellished"* written statement that McGaha obtained from Ashby. Instead, it is undisputed that McGaha never made any recommendation and Rosler's decision to terminate Stone was not based on a *"paper review"* by Rosler of *"false information"* supplied by McGaha. (Doc. 49, Tab 5 at ¶ 69.) Even Stone's petition concedes that Rosler did not merely conduct only a *"paper review"* of information supplied by McGaha and *"rubber stamp"* McGaha's recommendation, but that Rosler *"conducted an investigation of the allegation, including interviewing the co-worker and interviewing plaintiff, and reasonably concluded, based on the information she had, that plaintiff threatened to kill her supervisor."* (Petition at 5.)

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5. The Fourth Circuit's opinion in *Hill* expressly distinguished the Eleventh Circuit's decisions in *Stimpson* and *Llamapallas* and "decline[d] the opportunity to further parse the varying applications of the cat's paw or rubber stamp theory as employed by our sister circuits." 354 F.3d at 289-90.

The undisputed evidence established that during Rosler's interview of Stone, Stone *"confessed to a crime"* that she now claims that she did not commit. (Doc. 81 at 39.) Furthermore, Stone's own notes of her interview by Rosler acknowledged that her *"confession"* to Rosler was *"honest."* (*Id.* at Ex. 59) (*"Rosler asked me if I said that I felt like choking Joan McGaha's neck and me being honest I said yes, . . . she made me mad. . . . I was going to F_ _ _ _ _ g sue all of them."*) On that basis the district court correctly observed:

> The Court has taken notice of the conflicting evidence presented by the parties regarding the statement Ashby provided to the Human Resources Department. The Court cannot make findings of credibility at the summary judgment stage, however, the Court has determined that the conflicting statements given by Ashby are not needed to determine summary judgment in this case. Consequently, the opinion of this Court has not been founded on Ashby's statement to Human Resources.

(Petition at 11a - 11b n.4.)

3. The Eleventh Circuit And The District Court Correctly Decided The Case On The Merits.

a. Stone's Statements Constituted Grounds for Discharge.

Stone asserts that her comment to Ashby about *"choking"* McGaha was just a *"laughing" "figure of speech."* However, Stone's own handwritten notes of her feelings at the time confirm that Rosler's concern was justified. (Doc. 49, Tab 29, Ex. 61) (*"I felt so upset . . . I felt like I was going to choke her neck."*) *"[S]he made me mad . . . my mom had to calm me down with some Xanax – I made*

the gesture with my hands." (Doc. 49, Tab 29, Ex. 59.) Indeed, Stone's arguments in this case have acknowledged that when Stone was interviewed by Rosler, she ***"confess[ed] to a crime."*** (Doc. 81 at 39) (emphasis added.)

Stone has argued that Rosler should have conducted a more *"thorough investigation"* but has never explained what was left to investigate after her *"confession."* To be sure, Rosler could have investigated Ashby's report of other threatening statements by Stone, but there is no evidence that would call into question Ashby's report of such other threats. Instead, during pretrial discovery, Stone's co-employees confirmed what Ashby told Rosler. For example, another of the mail couriers, Angie Tallent, testified that Stone referred to McGaha as the *"one-eyed monster"* and made *"a lot of vulgar remarks"* about her. (Doc. 49, Tab 6 at ¶¶ 8-9.) Tallent also believed that Stone disliked McGaha so much that *"she was capable of doing something bad to her."* (*Id.*) Mary Baker, who shared a work area with Stone, testified that Stone *"did not like McGaha"* and was *"angry"* at McGaha *"much of the time,"* that Stone referred to McGaha as the *"one-eyed monster"* and once said, *"One of these days I'm going to take a pair of scissors and poke her good eye out."* (Doc. 49, Tab 1 at ¶ 5.)

Neither is there any basis for Stone's argument that Rosler's concerns over her comments were not justified. Indeed, Stone's own mother wrote to Stone's psychologist just a few months after her termination stating similar concerns. (Doc. 49, Tab 23, Ex. 21) (*"Last Saturday, I got very scared that she might harm me or herself, . . . I frankly became scared of her violence and uncontrolled speech. . . . She was actually foaming at the mouth. [H]er recent violence and rage . . . worry me very much."*) Even before that, Stone had physically assaulted her psychologist, Dr. Tom Johnson. (Doc. 49, Tab 15 at 52-53; Doc. 49, Tab 23 at 79), and frequently made threats of *"strangling"* people, including

her endocrinologist, her psychologist, and the daughters of her psychotherapist. (Doc. 49, Tab 15 at 55, 140-41.)[6]

Stone has argued that her comments were misunderstood; however, as the district court held (Petition at 15a), when an employer is faced with threatening comments, the employee's after-the-fact characterization that no threat was intended is not determinative. As the Seventh Circuit Court of Appeals has observed:

> [Plaintiff] argues that he has been misunderstood; that he hadn't meant to threaten anybody. But the issue is not whether Merheb was a menace; it's whether he appeared to be. . . . [A]n employer need not tolerate the continued presence of an employee who has terrified his coworkers merely because the technical elements of an assault are not present. Only if the other employees' frightened reactions to the words or conduct of a fellow employee were completely unreasonable would the employer be obligated to disregard them.

Merheb v. Illinois State Toll Highway, 267 F.3d 710, 713-14 (7th Cir. 2001). Other courts have agreed. *Johnson v. AT&T*, 422 F.3d 756, 762 (8th Cir. 2005) (where employee terminated for bomb threat, the proper inquiry is not whether he had made the bomb threats, it is whether the employer honestly believed that he did); *Rose v. Laskey*, 110 Fed. Appx. 136, 137 (1st Cir. 2004) ("Whatever plaintiff's ultimate intention, defendant cannot be faulted for taking this threat at face value."); *Palmer v. Circuit Court of Cook County*,

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6. Stone's psychologist testified that, when Stone threatened to strangle his daughters, he was concerned enough to breach his duty of confidentiality, tell his daughters that a patient had threatened them, and give them a description of Stone. (Doc. 49, Tab 15 at 55-57.)

Illinois, 117 F.3d 351 at 352-53 (7th Cir. 1997) (retention of employee who made threatening remarks that caused "justifiable anxiety to coworkers" not reasonable). *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (pretext inquiry is directed to the employer's *beliefs*, not to what the employee says the employer should have believed).

Stone seems to think that there is a meaningful difference between an employee's threatening to harm her supervisor and admitting that she got so angry and upset that she wanted to and actually *"felt like"* she was *"going"* to do so. However, even if Stone did not want to harm McGaha, her statement, nevertheless, violated Huntsville Hospital's *"zero tolerance"* policy. Under that policy other employees of Huntsville Hospital had been terminated for making threatening remarks even though they claimed that they were *"not serious"* about carrying out those threats. (Doc. 49, Tab 5 ¶¶ 34 *et seq.*) Indeed, just two days before Stone was terminated, another employee was terminated following an alleged *"unintended"* threat to a fellow employee that he claimed was not serious. (Doc. 49, Tab 20 at 240-41; Doc. 49, Tab 5 ¶¶ 48, 67-68.)

Huntsville Hospital's *"zero tolerance"* policy was well justified by potential "[c]laims of negligent hiring, supervision, and retention [which] loom large in the minds of employers and their lawyers." *Palmer*, 117 F.3d at 352-53 (7th Cir. 1997) (retention of employee who made threatening remarks that caused "justifiable anxiety to coworkers" "would place the employer on a razor's edge — in jeopardy of violating the [ADA] if it fired an employee, yet in jeopardy of deemed negligence if it retained him, and he hurt someone"). *See USA Petroleum Corp. v. Hines*, 770 So. 2d 589 (Ala. 1999) (affirming judgment for plaintiff who was assaulted by employee of defendant corporation, where corporation knew or should have known of employee's unfitness).

b. There Was No Substantial Evidence That McGaha "Manipulated" the Decision to Terminate Stone's Employment.

Stone argues that McGaha engineered her termination through false allegations. In fact, however, there was no recommendation by McGaha that Stone's employment should be terminated, McGaha had no authority to fire Kay or anyone else, and Rosler made the decision to terminate Stone with no input or recommendation by McGaha. (Doc. 49, Tab 5 ¶¶ 43, 66.)

Stone argues that McGaha caused Ashby to *"embellish"* her written statement of what Stone said to her, but the alleged language in question was, in fact, consistent with Stone's own admission that she *"felt like she was going to choke [McGaha's] neck"* when making *"the gesture with [her] hands."* (Doc. 49, Tab 29, Exs. 59 and 61.) Moreover, Ashby's testimony has never deviated from the essential facts that caused her to perceive Stone's remarks as an imminent threat to McGaha's safety — not a joke, and not a figure of speech. (Doc. 49, Tab 8 at 25-26, 159) (*"McGaha was in danger of imminent harm from[Stone]."*) In any event, the evidence is undisputed that Rosler did not make the decision to terminate Stone's employment on the basis of her *"paper review"* of Ashby's written statement. Instead, Rosler interviewed both Ashby and Stone and her decision was based on the information she obtained during those interviews. Rosler made the decision to terminate Stone with no input or recommendation by McGaha and would have made the same decision regardless of the language that McGaha allegedly added to Ashby's statement. (Doc. 49, Tab 5 at ¶ 69.)

Furthermore, there is no basis for the Stone's suggestion that McGaha's alleged attempt to *"influence"* the outcome of Rosler's investigation carried over into Rosler's interview

of Ashby. (Pl. Br. at 45.) That suggestion was not only expressly disavowed by Ashby (Doc. 49, Tab 8 at 155, 158-59), Ashby testified that all of the information attributed to her in Rosler's memorandum prepared of her investigation (Doc. 53, Tab A, Ex. 6) was entirely truthful and an accurate summary of what transpired. (Doc. 49, Tab 8 at 110-13, 143-44, 159.) Thus, even if it were arguable that McGaha was motivated by a discriminatory animus and wanted to *"influence"* the termination process, it is undisputed that she did not succeed in doing so.

c. There Was No Substantial Evidence That McGaha Was Prejudiced Toward Stone.

Stone has argued that discriminatory animus by McGaha can be *"infer[red]"* based on McGaha's *"increasingly negative . . . evaluations"* of Stone's performance in 1998 and 1999. (Pl. Br. to Eleventh Circuit at 8.) According to Stone *"during the final year or two of [her] employment,"* McGaha started *"using standards that had never been applied to her before"* and that *"negative performance evaluations"* were given by McGaha *"in an effort to get her fired or to get her to quit."* (*See* Doc. 54 at 32; Doc. 81 at 11.)

In fact, Stone, who was already much slower than her co-workers, admitted in her deposition that during the *"year or two"* before her termination, she became a *"whole lot slower"* in her performance. (Doc. 49, Tab 27 at 184-85.) By Stone's own estimate, her performance fell by a *"good 75 percent."* (Doc. 49, Tab 27 at 185-86.) The decline in Stone's performance affected all aspects of her work. (Doc. 49, Tab 27 at 184) (*"I was all of a sudden slower it seemed in everything."*) Stone's estimate of a *"75 percent"* decline in her performance during that last *"year or two"* is consistent with McGaha's observations that it took Stone *"twice as long"* to complete assigned tasks. (Doc. 49, Tab 28, Ex. 47.)" *These are the same duties she has done for 8 years."* (Doc. 49, Tab 28, Exs. 47, 78.)

The mere fact that McGaha agreed with Stone's own assessment of the indisputable and dramatic declines in Stone's performance (Doc. 49, Tab 27 at 184) is certainly not evidence of *"unfair"* appraisals or *"new performance standards."* Stone's hypersensitivity may have caused her to think that McGaha's lower appraisals of her performance in 1998 and 1999 were *"unfair,"* but that did not make them so. Nor does that evidence, in light of Stone's admission that she was *"all of a sudden slower, slower it seemed in everything"* (Doc. 49, Tab 27 at 184), support any inference of discriminatory animus.

4. Stone Never Established a Prima Facie Case of Discrimination.

The Americans with Disabilities Act ("ADA") and the Rehabilitation Act of 1973 prohibit employment discrimination against a "qualified individual with a disability," who, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8); 29 U.S.C. § 794.

The district court found that Stone did not show that she was able to perform the essential functions of her job with or without accommodations:

> After reviewing the evidence presented by the parties, it appears that Stone is unable to complete the essential functions of her mail courier job even with the written schedule accommodation and the transportation accommodation. Her inability to do this renders her not "otherwise qualified."

(Petition at 22a.) The district court also concluded that Stone had not identified any *reasonable* accommodation which would allow her to perform the essential functions of her

position. (Petition at 23a.) On that basis the district court held that "[b]ecause Stone is not otherwise qualified, she is unable to satisfy the second element of her prima facie case and therefore her [discrimination] claim should fail. Accordingly, Huntsville Hospital is entitled to summary judgment as to this claim." (Petition 23a.)

5. Stone Has No Valid Claim Of Retaliation.

Stone's retaliation claim is groundless because, as demonstrated above, she was terminated for the nonretaliatory reason that she made threatening statements concerning her supervisor.

Moreover, the only "protected activity" alleged by Stone in the district court was a letter, ghostwritten by her mother, which states that her feelings were *"hurt"* by her supervisor's counseling and she requests *"better treatment."* Nothing in this letter "opposes" any conduct prohibited by the ADA or requests any reasonable accommodation under that statute, nor was it "objectively reasonable" for Stone to believe so, as required for a claim of discriminatory retaliation. Instead, as demonstrated above, the only evidence is that McGaha's comments that Stone considered *"harsh"* was merely that McGaha was *"disappointed"* in her performance that day. (Doc. 49, Tab 27 at 239.)

6. The Opinion Below Has No Precedential Value.

Under the Rules of the Eleventh Circuit, "[u]npublished opinions are not considered binding precedent," though "[t]hey may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such citation is made." 11th Cir. R. 36-2.

CONCLUSION

Although the courts of appeals have phrased the relevant inquiry in *"cat's paw"* or *"rubber stamp"* cases in various ways, they recognize that the issue in such cases is whether there was a causal connection between the alleged bias and the adverse employment action. That is the standard followed by the Eleventh Circuit. Even if Stone had demonstrated that there is a clear conflict between the standard applied by the Fourth Circuit and that of other circuits, there would be no basis for the Court to grant review of this case because there is no evidence that the termination of Stone's employment was caused or influenced by the action of a biased supervisor. Accordingly, the Petition should be denied.

Respectfully submitted,

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